UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

In re Tri-State Water Rights Litigation | Case No. 3:07-md-01 (PAM/JRK)

MEMORANDUM AND ORDER

In Phase 2 of this Multi-District Litigation ("MDL"), the Court must evaluate the actions of the U.S. Army Corps of Engineers (the "Corps") in light of the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 et seq., and other similar statutes. Phase 1 of the litigation involved challenges to the Corps's operations at the northernmost dam and reservoir in the Apalachicola-Chattahoochee-Flint ("ACF") river basin. Phase 2 challenges those operations at the southernmost dam in the system, the Jim Woodruff Dam, which is located on the Apalachicola River at the border of Georgia and Florida.

The parties in this Phase are: the states of Alabama, Florida, and Georgia; the Southeastern Federal Power Customers ("SeFPC"); the cities of Apalachicola, Florida, and Atlanta, Columbus, and Gainesville, Georgia; the Georgia counties of Gwinnett, DeKalb, and Fulton; the Atlanta Regional Commission ("ARC"); the Cobb County-Marietta Water Authority; the Board of Water Commissioners of Columbus, Georgia, doing business as the Columbus Water Works ("CWW"); the Lake Lanier Association;[1] the Alabama Power

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[1] The Court will refer to Atlanta, Gainesville, Gwinnett County, DeKalb County, Fulton County, the ARC, the Cobb County-Marietta Water Authority, and the Lake Lanier Association collectively as "the Georgia parties." The city of Columbus and the CWW

Company ("APC"); the Apalachicola Bay and River Keeper, Inc. ("RiverKeeper"); and the Corps and several Corps officers. Also involved in Phase 2 are the United States Fish and Wildlife Service ("FWS") and a FWS official.[2]

BACKGROUND

In the 1990s, after this litigation began, the Environmental Protection Agency listed four Apalachicola River species as threatened or endangered. See 63 Fed. Reg. 12,664 (March 16, 1998) (listing Chipola slabshell and purple bankclimber mussels as threatened and fat threeridge mussel as endangered); 56 Fed. Reg. 49,653 (Sept. 30, 1991) (listing Gulf sturgeon as threatened). The listing of these species triggered the statutory requirement that the Corps consult with the FWS regarding the Corps's operations in the ACF basin. 50 C.F.R. § 402.14(a). The Corps initiated this consultation in March 2006. Letter from Curtis M. Flakes, Chief, Planning & Envt'l Div., U.S. Army Corps of Eng'rs, to Gail Carmody, FWS (March 7, 2006) (FWS AR371-93) (hereinafter "2006 consultation letter"). In this letter, the Corps described for the first time an Interim Operations Plan ("IOP") for the operation of Jim Woodruff Dam. This IOP, the subsequent revisions to the IOP, and the various Biological Opinions ("BiOp") issued by FWS regarding the IOPs, are the focus of the claims in Phase 2. Incredibly, however, a document entitled "Interim Operations Plan" does not exist. Rather, the parameters of the IOP are described in various letters, the BiOp, and other documents in

(collectively "Columbus") have different claims than the remaining Georgia parties and those claims will be addressed separately.

[2] The Court will refer to the Corps, the FWS, and their respective officers collectively as the "federal Defendants."

the record. See, e.g., 2006 consultation letter (describing the process that led to adoption of IOP and describing parameters of IOP in general, in 22-page letter from Corps to FWS); U.S. Army Corps of Eng'rs, Mobile Dist., Supplemental Environmental Assessment, Modifications to the Interim Operations Plan for Support of Endangered and Threatened Species and Temporary Waiver from ACF Water Control Plan, Jim Woodruff Dam, Gadsden and Jackson Counties, Florida, and Decatur County, Georgia, at EA-7-16 (FWS AR013694-703) (hereinafter "2008 EA") (describing IOP under heading "Description of the Recommended Plan").

In general, each IOP prescribes a plan for two different operations at Jim Woodruff Dam. First, the IOP sets forth the minimum outflow, or releases, from the dam at different times of the year, depending on the amount of water flowing into the ACF basin. Second, the IOP describes the procedure for "down-ramping," that is, reducing outflows from the dam in a controlled manner. Although down-ramping is not specifically tied to particular basin inflows, the implementation of the outflow requirements is dependent on basin inflows.

The 2006 IOP divided the calendar year into two periods: March through May and June through February. During the March-through-May period, when basin inflow was greater than 20,400 cubic feet per second ("cfs"), the 2006 IOP required the Corps to release 70% to 90% of that inflow, but in any case not less than 20,400 cfs. See 2006 consultation letter, encl. 1, at 1 (FWS AR395). These releases were intended to support the spawning of the Gulf sturgeon. Id. If, however, the basin inflow fell below 20,400 cfs, the 2006 IOP required the release of 100% of basin inflow, or 5,000 cfs, whichever was greater. Id.

The June-through-February period allowed the Corps to release less water, because sturgeon spawning is complete by June. Thus, if basin inflow was 8,000 cfs or greater, the Corps was required to release 70% to 90% of that inflow, but not less than 8,000 cfs. Id. at 2 (FWS AR 396). When basin inflow fell below 8,000 cfs, the Corps was required to release 100% of that inflow or 5,000 cfs, whichever was greater. Id.

As noted, the 2006 IOP also required the Corps to gradually reduce releases from the dam—i.e., to down-ramp those releases—during the transition from one flow regime to another. The 2006 IOP required fall rates of not more than 1.0 foot per day for flows at or above 18,000 cfs, not more than 0.5 feet per day for flows greater than 8,000 cfs, and 0.25 feet per day or less for flows less than 8,000 cfs. Id. at 3 (FWS AR397).

During 2006 and 2007, the ACF basin experienced unprecedented drought basin. This drought led to a extremely low water levels in the Corps's ACF reservoirs, and the Corps implemented extraordinary drought operations ("EDO") in November 2007. Biological Assessment, Temporary Modifications to the IOP for Jim Woodruff Dam & the Associated Releases to the Apalachicola River, at 5 (Nov. 1, 2007) (FWS AR 012262). As the Corps noted, although the 2006 IOP required minimum releases of 5,000 cfs from Jim Woodruff Dam, during July, August, and September 2007, average basin inflows were only 2,500 cfs, falling to less than 2,000 cfs during October 2007, seriously depleting the water stored in the upstream reservoirs. Id. The EDO allowed the Corps to reduce releases from Jim Woodruff Dam from 5,000 cfs to 4,150 cfs, depending on the levels, or "action zones," of the upstream reservoirs. Id. at 7 (FWS AR012264); see also July 17, 2009, Memorandum & Order (Docket

No. 264) at 48-49 (describing action zones in the 1989 Draft Water Control Plan). "[T]he Corps uses the action zones 'to manage the lakes at the highest level possible for recreation and other purposes that benefit from high lake levels.'" Id. (quoting Memorandum, U.S. Army Corps of Eng'rs, ACF Drought Conference, at 11 (Sept. 20, 1997) (SUPPAR035773)).

In 2008, the Corps revised the 2006 IOP in light of "lessons learned from 2006-07." Letter from Curtis M. Flakes to Gail Carmody, at 2 (Apr. 15, 2008) (FWS AR012802). The 2008 IOP is the current IOP for the Jim Woodruff Dam.

The 2008 IOP changed the parameters of the 2006 IOP in fairly significant ways. It set forth three distinct yearly flow periods, rather than two: March through May ("spawning season"); June through November ("non-spawning season"); and December through February ("winter"). Description of Proposed Action, Modification to the IOP at Jim Woodruff Dam, at 2 (Apr. 2008) (FWS AR012805). It also provided for more variation in outflow depending on basin inflows.

For the March-through-May period, when the upstream reservoirs are essentially full pool and just below full, the 2008 IOP provides for releases of less than basin inflow, unless that inflow falls below 5,000 cfs. Id. at 3 (Table) (FWS AR012806). As the Corps described it, the 2008 IOP for the spawning (March-through-May) season comprises "two sets of four basin inflow thresholds and corresponding releases [] based on composite storage." Id. at 2 (FWS AR12805). The non-federal parties do not in general challenge the 2008 IOP's maximum flows. Rather, the focus is on the minimum flows, which may fall below 5,000 cfs under certain circumstances, to a minimum of 4,500 cfs when composite storage is in the

"drought zone," regardless of basin inflow. Id. at 3 (Table) (FWS AR012806).

The FWS issued its original BiOp in early September 2006, concluding that the IOP would not jeopardize the listed species and would not adversely modify those species' critical habitat. U.S. Fish & Wildlife Service, Biological Opinion & Conference Report on the U.S. Army Corps of Eng'rs, Mobile Dist., Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River at 139 (Sept. 5, 2006) (FWS AR328) (hereinafter "2006 BiOP"). In October 2006, the Corps issued an environmental assessment ("EA") and Finding of No Significant Impact ("FONSI"). U.S. Army Corps of Eng'rs, Environmental Assessment, Interim Operations Plan for Support of Endangered and Threatened Species, Jim Woodruff Dam, Gadsen & Jackson Counties, Florida, and Decatur County, Georgia (October 2006) (FWS AR9440). The Corps concluded in the EA that its was unnecessary to prepare a full EIS for the 2006 IOP.

As with the original IOP, the FWS concluded that the revisions in the 2008 IOP (including the EDO) would not jeopardize the listed species or adversely modify their habitat. The FWS issued the final BiOp, the one at issue here, in June 2008. U.S. Fish & Wildlife Service, Biological Opinion on the U.S. Army Corps of Eng'rs, Mobile Dist., Revised Interim Operating Plan for Jim Woodruff Dam and the Associated Releases to the Apalachicola River (June 1, 2008) (FWS AR013470-013694) (hereinafter "2008 BiOp"). The Corps followed the 2008 BiOp with yet another EA, again concluding that an EIS was not required. See 2008 EA at EA-19 (FWS AR013706) ("[W]e have determined that implementation of the recommended plan will have no significant environmental or human impacts.").

In 2008, the Corps announced its intention to update the Water Control Plan ("WCP") for the ACF basin. 73 Fed. Reg. 9780-81 (Feb. 22, 2008). The Corps has been operating under a draft WCP since 1989. Because of this litigation and the parties' attempts to work out their differences in the intervening two decades, the 1989 WCP was never finalized or formally adopted. (See July 17, 2009, Order (Docket No. 264) at 47-49 (discussing terms of 1989 WCP).) Nor was the 1989 WCP ever subjected to any sort of environmental review.

B. Listed Species

The BiOp considers four endangered or threatened species in the ACF Basin below Jim Woodruff Dam. Only three of these species, however, are involved in this Phase of the litigation.

The Gulf sturgeon is a large fish that spawns in the Apalachicola and other rivers in the area. It was listed as threatened in 1991. The fish live in the river as juveniles, but after developing a tolerance for increased salinity, the fish eventually make their way to the Gulf of Mexico, returning to the river only to spawn.

The fat threeridge mussel was listed as endangered in 1998. It is found exclusively in the Apalachicola River. Fat threeridge mussels prefer shallower water but cannot tolerate dry conditions.

The purple bankclimber mussel was also listed as threatened in 1998. It is more dispersed regionally than the fat threeridge, and prefers deeper water. According to the Corps, less than 25% of the total population of purple bankclimbers call the Apalachicola and its tributaries and distributaries home.

DISCUSSION

There are two statutory schemes at issue in Phase 2. One is NEPA, which imposes procedural requirements on all federal agencies. NEPA requires every federal actor to prepare an environmental impact statement before undertaking any "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). NEPA also requires federal actors to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" in the action. Id. Thus, NEPA imposes two separate obligations on the Corps. First, if the Corps's actions constitute "major Federal actions" and "significantly affect[] the quality of the human environment," the Corps is required to prepare an EIS. Second, in evaluating the effects of the Corps's actions, the Corps is required to consult with the appropriate federal agency regarding the action. In this case, the federal agency with jurisdiction over the Corps's operations is the FWS.

The ESA supplements the requirements of NEPA, imposing substantive limits on what a federal agency can do. So while NEPA imposes procedures—the Corps must consult, the Corps must prepare an EIS—the ESA (which also imposes some procedural requirements) is more akin to a Hippocratic oath: do no harm.

> Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species . . . .

16 U.S.C. § 1536(a)(2). Agency actions come within the requirements of the ESA if they are

"discretionary." 50 C.F.R. § 402.03. Thus, for example, the existence of the dams in the ACF basin is not discretionary. Congress ordered that the dams be built and, as Florida puts it, "that's the end of it." (Fla.'s Supp. Mem. at 25 n.14.) However, the Corps's operation of those dams is discretionary.

ESA regulations require the Corps to consult with the FWS whenever its discretionary actions "may affect" listed species or their habitat. 50 C.F.R. § 402.14(a). This consultation must be initiated "at the earliest possible time." Id.

In addition, the ESA prohibits the "take" of any endangered species by anyone, including any federal agency. 16 U.S.C. § 1538(a)(1)(B). "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect . . . ." Id. § 1532(19). "Harm" includes harm to the species' habitat in the form of "significant habitat modification or degradation . . . ." 50 C.F.R. § 17.3. The regulations governing biological opinions require the FWS to identify whether the agency action will result in any "incidental taking," which is defined as "any taking otherwise prohibited [by the ESA], if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." Id. If the FWS determines that some incidental take will occur from the agency action, the FWS must publish an Incidental Take Statement ("ITS") that specifies the amount of the take, sets forth reasonable and prudent measures ("RPMs") to minimize the take, and also sets forth terms and conditions for compliance with the RPMs. 16 U.S.C. § 1536(b)(4). The FWS must ensure that the take will not cause "jeopardy" to the species, or will not "reduce appreciably the likelihood of both the survival and recovery of" the species or "appreciably diminish[] the value of critical

habitat for both the survival and recovery of" the species. 50 C.F.R. § 402.02.

Although the parties make different arguments with respect to the various statutes, their legal claims are, for the most part, similar.[3] The Florida parties, Alabama, APC, and the Georgia parties contend that all version of the BiOp are contrary to the ESA. (See, e.g., Fla.'s 3d Am. Compl. (Docket No. 38 in 3:07-cv-250), Second through Sixth Claims for Relief; Ala.'s 7th Am. Compl. (Docket No. 85 in 3:07-cv-249), Count 14.) The Georgia parties, Alabama, APC, Apalachicola, Columbus, and the SeFPC claim that the IOPs all violated the requirements of NEPA. (See, e.g., Ga.'s Am. Compl. (Docket No. 60 in 3:07-cv-251), Count I; APC's 7th Am. Compl. (Docket No. 84 in 3:07-249), Count 12; SeFPC's Am. Compl. (Docket No. 230 in 3:08-640), Count VIII.) Every party argues that the Corps's failure to conduct any environmental review of the plan by which the Corps continues to operate its projects in the ACF basin, the 1989 WCP, is contrary to NEPA.

Columbus also claims that the Corps violated the Water Resources Development Act ("WRDA"), 33 U.S.C. § 2312. (Compl. (Docket No. 2 in 3:07-cv-1033), Count Three.) The WRDA requires that any change in reservoir operations that "will significantly affect any project purpose" must be subject to public review and comment. 33 U.S.C § 2312. Columbus argues that water quality is one of the authorized purposes of West Point Lake, a reservoir in the ACF Basin near Columbus, and that the IOP "significantly affect[s] water quality downstream of West Point Lake." (Compl. ¶ 103.) Columbus alleges that the Corps's failure

[3] Only one of the member cases does not have any Phase 2 claims. Georgia v. United States Army Corps of Eng'rs, M.D. Fla. No. 3:07-cv-1033 ("Georgia I"). The claims in Georgia I were all resolved in Phase 1.

to subject any IOP to public review and comment therefore violated the WRDA. (Id. ¶¶ 105-06.)

Finally, APC contends that the Corps's failure to support navigation in the ACF Basin renders the IOPs and BiOps invalid. (APC's 7th Am. Compl. (Docket No. 84 in 3:07-249), Counts 12-13.) Count 14 of APC's 7th Amended Complaint is also a claim related to navigation, contending that the Corps has abandoned dredging to support navigation in the ACF basin, and that this decision is contrary to NEPA, the WRDA, and the Flood Control Act. (APC's 7th Am. Compl. (Docket No. 84 in 3:07-cv-249) ¶¶ 253-56.) However, APC's Motion does not seek judgment on this claim. (See APC's Mem. Supp. Partial J. (Docket No. 102 in 3:07-249) at 1 (stating that APC seeks judgment on Counts 12 and 13 of its 7th Amended Complaint).)

The parties do not confine their claims to the most recent versions of the IOP and BiOp, challenging all versions as contrary to NEPA and/or the ESA. Although the terms of previous iterations of the 2008 IOP and 2008 BiOp are important for a full understanding of the Corps's operations, the 2008 IOP and 2008 BiOp superceded all previous versions and thus only these actions are before the Court in this Phase.

A. Standard of Review

This Court's review of agency decisionmaking is conducted under the Administrative Procedure Act ("APA"), which provides that an agency's decision may be overturned only if that decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); see also Miccosukee Tribe of Indians of Fla. v. United

States, 566 F.3d 1257, 1264 (11th Cir. 2009) (quoting § 706(2)(A)). "[T]his standard of review is exceedingly deferential." Sierra Club v. Van Antwerp, 526 F.3d 1353, 1360 (11th Cir. 2008) (quoting Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996)). And when the agency's decisions fall "within its area of special expertise, at the frontiers of science . . ., a reviewing court must generally be at its most deferential." Baltimore Gas & Elec. Co. v. Natural Resources Def. Council, Inc., 462 U.S. 87, 103 (1983).

B. ESA claims

1. Standing

Before addressing the substance of the parties' ESA arguments, the Court must first ensure that it has jurisdiction to consider those arguments. Jurisdiction exists when the subject matter of the controversy falls within the Court's constitutional decisionmaking power under Article III of the Constitution, and when the parties have standing to raise their claims before the Court. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992) (discussing limits on judicial power).

The Georgia parties assert that the 2008 BiOp must be set aside because the 2008 BiOp incorrectly concluded that the Corps's activities under the 2008 IOP would result in the take of protected mussel species. In the 2008 BiOp, FWS found that the take of mussels could occur at flows less than 5,000 cfs. 2008 BiOp at 181 (FWS AR013664). According to the Georgia parties, any mortality of the protected mussels results not from the Corps's operations, but from nature. If the low flows occur naturally, then according to the Georgia parties there is no causation and no "take."

However, the Georgia parties do not have standing to challenge the ITS for the mussels. Standing requires an injury in fact, a causal connection between the injury and the action complained of, and the likelihood that a favorable decision will redress that injury. Lujan, 504 U.S. at 560-61. The Georgia parties do not claim to be injured by the ITS, and the Court cannot discern any potential injury the Georgia parties could have suffered. They do not challenge the RPMs set forth in the ITS; there is no claim, for instance, that a certain RPM affects some vested right. The Georgia parties likewise do not specify how an order voiding the ITS would benefit them. Rather, their claim seems only to be a request that the Court force the parties to acknowledge the role "natural" flows play in the species' survival. This is not injury or causation for the purposes of standing. The Court will not consider the Georgia parties' ESA claim because the Court has no jurisdiction over that claim.

2. Baseline

The ESA regulations require that the agency "consider[] the effects of the action as a whole." 50 C.F.R. § 402.14(c). Most of the non-federal parties contend that the ESA required the Corps to evaluate the effects not only of the 2008 IOP, but also of the 1989 WCP on which the IOP is based. Florida argues that the Corps's and the FWS's focus on the IOP violated the ESA because it improperly "segmented" the Corps's basin-wide actions. The parties also assert that the Corps used the wrong "environmental baseline" in examining the IOP. The relevant regulation requires the FWS to examine

> the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline. The

> environmental baseline includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area . . . .

Id. § 402.02. The FWS's Consultation Handbook similarly requires the FWS to examine the "aggregate effects" of the action in determining whether the action is "likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat." U.S. Fish & Wildlife Serv. & Nat'l Marine Fisheries Serv., Consulation Handbook, at 4-31 (March 1998) (FWS AR7490).[4]

The federal Defendants do not dispute that the FWS segmented its analysis here, but contend that such segmentation is expressly permitted by the ESA. The regulations provide that the Corps's consultation with the FWS "may encompass . . . a segment of a comprehensive plan." 50 C.F.R. § 402.14(c). However, as the challenging parties point out, the regulations also caution that such segmentation "does not relieve the Federal agency of the requirements for considering the effects of the action as a whole." Id.

The federal Defendants first argue that the FWS complied with the dictates of the ESA and its own Consultation Handbook, which requires the FWS to include in the environmental baseline the "total effects of all past activities, including the effects of the past operation of the project . . . ." Consultation Handbook at 4-28 to 4-29 (FWS AR7487-88) (emphasis omitted). The federal Defendants note that the BiOp's determination regarding jeopardy to the species and habitat "is the sum of the effects evident in the baseline plus effects of the action and

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[4] The Eleventh Circuit Court of Appeals has held that the Consultation Handbook is as binding as a regulation on the FWS and is entitled to Chevron deference. Miccosukee Tribe, 566 F.3d at 1273.

cumulative effects." 2008 BiOp at 125 (FWS AR013608).

The parties' arguments in this regard are an attempt to state a claim under the ESA for what is, in fact, a claim under NEPA: that the Corps should have submitted for consultation and an EIS its operations in the ACF basin as a whole. Whatever the merit of this argument, the Corps's alleged failings do not mean that the 2008 BiOp violated the ESA. In the BiOp, the FWS did what it was supposed to do: it looked at the specific actions taken in the IOP in light of the actions that came before. The parties may disagree with the BiOp's conclusion that the IOP would not make the situation worse for the listed species, but the FWS did not rely on an improper baseline or improperly segment its analysis. This portion of the ESA claim fails.

3. Take

The 2008 BiOp contains an ITS for the Gulf sturgeon, purple bankclimber mussel, and fat threeridge mussel. 2008 BiOp at 180-86 (FWS AR013663-69). In an ITS, the FWS is required to determine whether a given action "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species . . . ." 50 C.F.R. § 402.02; see also Miccosukee Tribe, 566 F.3d at 1270 (noting that two courts of appeals invalidated FWS's prior interpretation of this regulation to require reduction in both survival and recovery of species). Thus, in evaluating the effects of an incidental take, the FWS must examine not only whether the action will reduce the species' survival or recovery, but also whether that action can reasonably be expected to have that effect.

a. Gulf sturgeon

The FWS determined that, should the Corps allow the river stage to decline rapidly during the spring spawn, Gulf sturgeon eggs or larvae could be killed. 2008 BiOp at 180 (FWS AR013663). However, because of a lack of data, the FWS could not determine whether the rapid fall rates would indeed occur and thus declined to issue RPMs, instead stating that FWS would work with the Corps to "produce surrogate measure of anticipated take by January 31, 2009." Id. at 181 (FWS AR013664). This consultation resulted in the Corps agreeing not to allow rapid declines in river stage, and thus the FWS ultimately declined to issue an ITS for the Gulf sturgeon. (U.S. Army Corps of Eng'rs, BiOp Annual Report for Fiscal Year 2008, at 11-13 (Jan. 31, 2009) (Docket No. 322-1).)

The Florida parties argue that the failure to issue an ITS for the sturgeon was arbitrary and capricious, because the FWS acknowledged that some eggs could be stranded at low flows, and because low flows cause higher salinity in the estuarine habitat in Apalachicola Bay, near the mouth of the Apalachicola river, which precludes juvenile sturgeon from venturing into the estuarine environment where food is more plentiful.

The FWS and the Corps resolved the first objection: they studied the issue and changed the down-ramping schedule. (Id.) The FWS thereafter concluded that, with an adjusted fall rate, sturgeon eggs were not likely to be stranded. The Florida parties have pointed to no evidence that this ultimate conclusion was incorrect, and the Court will not set it aside.

Nor have the Florida parties succeeded in establishing that the FWS's conclusion about salinity levels is arbitrary and capricious. The FWS relied on a study that showed that the 2008

IOP would have a beneficial effect on the salinity levels in the Bay, because it would decrease the number of days in which the flow was less than 16,000 cfs. 2008 BiOp at 83 (FWS AR013566). The Florida parties disagree with this conclusion, but they do not contend that the FWS ignored any critical evidence. Rather, they contend that the ultimate conclusion is incorrect. But this is not the Court's role in reviewing an agency decision. The Court must defer to the FWS's scientific determinations, and that deference is "especially strong because the agency had to predict future hydrologic conditions and estimate the likelihood, extent, and duration of injury to a species." Miccosukee Tribe, 566 F.3d at 1271. The Court is not free to make its own independent judgments. Based on the evidence before the FWS, the BiOp's conclusion that the IOP would not increase salinity levels and therefore would not adversely modify sturgeon habitat was not arbitrary and capricious.

b. Mussels

The FWS also concluded that flows of less than 5,000 cfs would result in the take of both the fat threeride and purple bankclimber mussels. The ITS found that "a maximum of 200 purple bankclimbers may be exposed on the rock shoal near RM 105 and at a few locations elsewhere in the action area . . . ." 2008 BiOp at 181 (FWS AR013664). The ITS provided for a much greater incidental take of fat threeridge mussels, finding that a "maximum of 21,000 fat threeridge (9% of the population) may be exposed . . . when the minimum flow is reduced to 4,500 cfs." Id. at 182 (FWS AR013665).

The Florida parties contend that the ITSs for the mussels are void because of a failure of analysis. For example, the Florida parties point out that the FWS conceded that it does not

know the total population of purple bankclimber mussels. Thus, the Florida parties argue that the ITS's allowance of a take of 200 purple bankclimbers cannot be justified, because the FWS does not know whether 200 mussels constitute 10% or 90% of the total population. However, purple bankclimbers are deep-water mussels that are "rarely found at stages greater than 4,500 cfs in the Apalachicola." Id. at 178 (FWS AR013661). Thus, low-flow regimes are unlikely to affect whatever purple bankclimbers exist in the Apalachicola. The FWS also specified that the Corps must "assume responsibility for the studies and actions" to minimize take and evaluate the species' status. Id. at 184 (FWS AR013667). A lack of data does not preclude an ITS; the FWS is required to use the "best scientific and commercial data available." (Fla.'s Supp. Mem. at 30 (quoting Nat'l Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170, 175 (D.D.C. 2004)).) When data is lacking, as it is with respect to the purple bankclimber, the FWS may "develop the biological opinion with the available information giving the benefit of the doubt to the species." Consultation Handbook at 1-6 (FWS AR7414). The FWS did this here, because it required the Corps to perform follow-up studies on the mussels and to reinitiate consultation if those studies or the Corps's operations resulted in more complete information about the status of the species. See 2008 BiOp at 182 (FWS AR013665); see also 50 C.F.R. § 402.14(i)(4) (requiring reinitiation of consultation if amount or extent of incidental take is exceeded). The ITS for the purple bankclimber does not violate the ESA.

The Florida parties' disagreement with the ITS for the fat threeridge mussel is two-fold. First, the Florida parties contend that the fat threeridge is in a slow decline and that the Corps and FWS have a duty to try to stop this decline. Second, they argue that the take of 9% of the

fat threeridge population must be evaluated in light of the large-scale die-off of these mussels during the 2006-2007 drought, and that when combined with that die-off, the additional 9% take will result in jeopardy to the species.

The BiOp concluded that it was unlikely that the take authorized by the ITS would actually occur. See 2008 BiOp at 182 (FWS AR013665) ("[W]e do not anticipate take of this nature at this time.") That conclusion was based on the FWS's examination of the relevant evidence, including that the mussels had not colonized areas over 5,000 cfs since the drought and therefore were unlikely to be exposed at flows below 5,000 cfs. Id. The Florida parties have not pointed to any scientific evidence contradicting the evidence on which the FWS relied, nor have they established that the FWS ignored any relevant evidence in making this determination. Again, they merely contend that the ultimate conclusion is incorrect. They have failed to establish that the ITS for the fat threeridge mussel is arbitrary and capricious.

C. NEPA

The second type of claim asserted in Phase 2 is the allegation that the Corps violated its obligations under NEPA. The NEPA claims take two general forms. First, all non-federal parties assert that the Corps violated NEPA by implementing the initial 2006 IOP prior to seeking the FWS's advice on the effects of the IOP. Second, they argue that the Corps should have prepared an EIS for the 2006 IOP or the 2008 IOP, including not only the isolated effects of the IOP itself but also the entire operating plan for the ACF basin memorialized in the never-finalized 1989 WCP. All versions of the IOP reference the operations required by the 1989 WCP, such as the "action zones" discussed briefly above. However, because the 1989 WCP

was never finalized or adopted, those operations were never subject to NEPA review. The non-federal parties therefore contend that every version of the IOP is invalid under NEPA. The federal Defendants essentially admit that the Corps violated NEPA by failing to seek consultation with the FWS before the 2006 IOP was put into practice. (See Fed. Def.'s Mem. Supp. Summ. J. at 138 (noting that NEPA requires consultation "before [actions] are implemented" so that agency decisionmakers can be fully informed).) However, the federal Defendants contend that all of the NEPA challenges to any version of the IOP are moot and that challenges to the 1989 WCP are beyond the statute of limitations.

As with the ESA claims, each party's arguments about the Corps's alleged violations of NEPA are similar, though not identical. SeFPC, for instance, contends that the Corps violated NEPA by failing to take into account the environmental consequences of the reduction in hydropower generation. In other words, if less power is produced through hydropower, more power must be produced through other, less environmentally friendly methods. SeFPC argues that the Corps should have examined this environmental consequence and concluded that an EIS for the IOP was required.

The Georgia parties contend both that the IOP and the still-to-be-prepared WCP and manual suffer from the same flaws: the Corps is ostensibly not considering "all reasonable alternatives" in determining its future operations. In the Order on Phase 1, the Court found that water supply was not an authorized project purpose of the northernmost dam in the ACF basin and its reservoir. (July 17, 2009, Order (Docket No. 264) at 77.) The Court stayed its ruling for three years to allow the parties to attempt to resolve the issue. (Id. at 93-94.) Failing such

resolution, the parties are faced with the possibility that the Atlanta metropolitan area will be without a significant source of municipal and industrial water as of July 2012. The Georgia parties complain that the new WCP and supporting documents will examine only alternatives that comply with this Court's Order regarding authorized project purposes. They argue that the Corps should include current and future water-supply needs in its examination of all alternatives for the ACF basin, so that decisionmakers, including Congress, have all the information they need about the environmental effects of all potential ACF operations. The federal Defendants argue that any challenge to the alternatives considered in the future water control plan or master manual is not ripe, because neither of those documents are finalized. The Corps has also made clear that it will not consider water supply in the new water control plan or other documents unless Congress or the Court order it to do so. (June 8, 2010, Hrg. Tr. at 94-95.)

Columbus argues that the Corps failed to consider water quality impacts in its after-the-fact environmental review of the IOP. Columbus contends that the Corps should have examined basin-wide operations under the 1989 WCP rather than limiting its analysis to the IOP, and that such an examination must include water quality. And both Alabama and the APC claim that the IOP reflects the Corps's unauthorized decision to abandon support for navigation in the ACF basin, in violation of NEPA and other statutes.

The federal Defendants' response to the various NEPA arguments is telling: having spent 135 pages of its opening memorandum discussing the parties' challenges to the 2008 BiOp, the federal Defendants dismiss the NEPA arguments in fewer than 10 pages. The

decision to focus on the BiOp is interesting, because a violation of NEPA's procedural requirements would invalidate not only the IOP, but everything on which that IOP is based, including the BiOp. More curious is the federal Defendants' admission that NEPA required the Corps to consult with the FWS before implementing the IOP, and that it did not do so. A violation of NEPA cannot be cured by a post hoc consultation, because the "object of NEPA is to require federal agencies to consider environmental values when making decisions," C.A.R.E. Now, Inc. v. Fed. Aviation Admin., 844 F.2d 1569, 1572 (11th Cir. 1988), not after such decision are made. See Commonwealth of Mass. v. Watt, 716 F.2d 946, 952 (1st Cir. 1983) (NEPA is "aimed at presenting governmental decision-makers with relevant environmental data before they commit themselves to a course of action.") (emphasis in original). As then-Judge Breyer explained,

> NEPA is designed to influence the decisionmaking process; its aim is to make government officials notice environmental considerations and take them into account. Thus, when a decision to which NEPA obligations attach is made without the informed environmental consideration that NEPA requires, the harm that NEPA intends to prevent has been suffered. . . .[T]o set aside the agency's action at a later date will not necessarily undo the harm. The agency as well as private parties may well have become committed to the previously chosen course of action and new information—a new EIS—may bring about a new decision, but it is that much less likely to bring about a different one. It is far easier to influence an initial choice than to change a mind already made up.

Id. (emphases in original). The Corps's rather cavalier attitude toward its duties under NEPA is distressing, to say the least.

The Court is troubled by the Corps's refusal to take responsibility for its utter failure to conduct any sort of environmental analysis whatsoever on the plan by which it has operated

the ACF basin for more than 20 years. Of course, the lack of an EIS for the 1989 WCP is not to be blamed solely on the Corps, for the states bear their share of blame for the Corps's failure update or finalize the 1989 WCP. (See June 8, 2010, Hrg. Tr. at 115-16 (discussing Alabama senator's hold on the nomination of the assistant secretary of the Army until he agreed not to revise the 1989 WCP).) However, it is the Corps's ultimate responsibility to ensure that its actions conform to the law, and the law is clear that actions of the scope and magnitude of the 1989 WCP require the comprehensive environmental analysis performed in an EIS. More importantly, an analysis of the environmental impacts of the Corps's operations under the 1989 WCP might have helped break the stalemate that has paralyzed this litigation for two decades. It is possible that if the parties had more information about the true effects of the Corps's operations, resolving their differences would have been easier.

The Corps is in the process of preparing a new WCP for the ACF basin, and has indicated that it will also prepare an EIS for that WCP. This is a step in the right direction. Had the Corps been less recalcitrant over the past 20 years, it is possible that such a step might have forestalled this Phase of the litigation altogether. But given the contentious history in the ACF basin, it is not surprising that no party is willing to trust the Corps to do its job in accordance with the law. Rather, they seek to remind the Corps, before the fact, of its future obligations, and to reinforce that reminder by punishing the Corps, in ways not specified, for its past failures.

At this point, however, the NEPA violations outlined so clearly in the non-federal parties' papers are violations without a remedy. The IOP is a temporary plan of operations;

it will expire when the new WCP is in place. Thus, the harms suffered are no longer redressable. The Court should not, and indeed cannot, issue a decision that has no practical effect. See Warth v. Seldin, 422 U.S. 490, 505-06 (1975); C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 113 (1948). Should the Court invalidate the IOP, the Court would order the Corps to prepare an EIS on the 1989 WCP. But the Corps is already preparing an EIS for a new WCP. It makes little practical sense for the Corps to dedicate its limited resources to developing an EIS for a plan that is destined to be replaced within two years.

The NEPA claims are therefore prudentially moot, as the federal Defendants argue. The challenged practice "is, at the moment adjudication is sought, undergoing significant modification so that its ultimate form cannot be confidently predicted." A.L. Mechling Barge Lines, Inc. v. United States, 368 U.S. 324, 331 (1961). "A case is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." Ethredge v. Hail, 996 F.2d 1173, 1175 (11th Cir. 1993) (emphasis added). Although it is possible for the Court to order the Corps to prepare an EIS for the IOP and/or the 1989 WCP, that relief has no practical effect in the realities of this litigation. Any relief this Court could give is therefore not "meaningful" and the claims are moot.

However, the Court must caution the Corps that further refusals to comply with its statutory duties cannot be avoided merely by pleading prudential mootness. Nor will this Court, or future courts considering the Corps's actions, look favorably on the Corps's stubborn insistence on excluding from its analysis all reasonable alternatives in the ACF basin. For instance, an EIS that does not at least consider the effects of current and future water supply

withdrawals from Lake Lanier as well as other points in the ACF system is, for all intents and purposes, a useless document. The Georgia parties are correct that all decisionmakers would benefit from the comprehensive analysis of a range of potential activities in the ACF basin, and it is likely that the Corps's failure to conduct such an analysis would be an abuse of the Corps's discretion under the APA.

As always, the Court encourages the parties to work together toward an analysis that will advance the ultimate resolution of this litigation.

CONCLUSION

The ESA claims are without merit and must be dismissed. The NEPA claims are prudentially moot. Accordingly, **IT IS HEREBY ORDERED that**:

1. Alabama's Motion for Summary Judgment (Docket No. 303) is **DENIED**;
2. Florida and Apalachicola's Motion for Summary Judgment (Docket No. 309) is **DENIED**;
2. The Georgia parties' Motion for Summary Judgment (Docket No. 307) is **DENIED**;
3. The SeFPC's Motion for Summary Judgment (Docket No. 301) is **DENIED**;
5. APC's Motion for Partial Judgment (Docket No. 102 in Civ. No. 3:07-249) is **DENIED**;
6. Columbus and Columbus Water Works' Motion for Summary Judgment (Docket No. 302) is **DENIED**;
7. Apalachicola Bay and River Keeper's Motion for Summary Judgment (Docket

No. 305) is **DENIED**;

4. The federal Defendants' Motion for Summary Judgment (Docket No. 322) is **GRANTED**; and

8. The claims raised in Phase 2 of this litigation are hereby **DISMISSED**.

Dated: July 21, 2010

s/Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge